IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 8TH NOVEMBER 2006 / 17TH KARTHIKA 1928

CRL.A.No.1650 of 2004(C)

SC.125/2002 of ADDL. SESSIONS COURT, FAST TRACK COURT-II, ALAPPUZHA
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APPELLANT/ACCUSED:

SIVADASAN, S/O.NANDANAN, EERAKKATTU THEKKETHIL, CHINGOLI MURI, CHINGOLI VILLAGE, KARTHIKAPPALLY.

BY MR.C.J.JOY, ADVOCATE.
MR.V.K.PRAVEEN, ADVOCATE.

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REP. BY THE EXCISE RANGE INSPECTOR, KARTHIKAPPALLY THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY MR. THOMAS JOHN AMBOOKEN, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

Crl. Appeal No.1650 OF 2004

Dated this the 8th day of November, 2006

J U D G M E N T

The appellant was convicted and sentenced under Section 55(a) of the Abkari Act to undergo rigorous imprisonment for one year and to pay a fine of Rs.1 lakh and in default of payment of fine to undergo rigorous imprisonment for three months. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, on 13.01.1999 at about 5 a.m PW1, the Excise Inspector, was on patrol duty along with PW2, the Preventive Officer and others. They reached near the house of one Jamal and found two persons, one pouring some liquid from a can M.O.1 to a bucket M.O.2, which was held by the appellant and they attempted to run away. The appellant was apprehended while the other person abandoned the can, which was held by him and ran way. Though the other person was chased, he could not be arrested. On being satisfied that they were in possession of arrack, the contraband articles were seized from the place. There was one litre of arrack in the bucket M.O.2 and eight litres of arrack in the can M.O.1.

3. The articles were seized under a mahazar Ext.P1 and the material objects were also seized. 300ml of sample was taken from the arrack, the sample and the can were sealed and labeled. Label was affixed on M.O.2 bucket also. On enquiry, the person who ran away stated to be one Raghu. The appellant was arrested from the spot. The mahazar Ext.P1 was recorded and he was taken to the Range Office from where PW4 registered an occurrence report, Ext.P2, on the same day. He conducted an enquiry and questioned the witnesses and produced the articles and the accused in court. The property list is Ext.P3. Sample was analyzed and Ext.P4 is the report. CW5 submitted the final report. The name of the second accused was not recorded in Ext.P2, since the details of the said person was not obtained.

4. To prove the prosecution case, PWs 1 to 4 were examined and Exhibits P1 to P4 were marked. M.O.1 and M.O.2 were also marked. DW1 was examined on the side of the accused. The trial court on an analysis of the evidence found that DW1 has come forward to give false evidence at the instance of the accused and also found that the evidence of PWs 1 and 2 is reliable and prosecution succeeded to prove beyond reasonable doubt that the accused along with the another possessed arrack. He was found guilty of offence under

Section 55(a) of the Abkari Act.

5. According to the accused, he is innocent of the allegation made and he was not in possession of arrack. He was arrested by the police when he was coming with water in the bucket after attending nature's call early in the morning and he was asked about the person who escaped on seeing the police. He could not give any information and hence he was arrayed as an accused in this case. To prove his case, DW1 was examined.

6. The case of the prosecution is that, the appellant who is the first accused was carrying a bucket, to which, the second accused, whose whereabouts could not be traced out, was found pouring arrack from a can held by the second accused. The can contained eight litres of arrack and the bucket contained one litre of arrack at the time of occurrence. The appellant is implicated for holding the bucket containing one litre of arrack and he was said to be in possession of bucket with arrack. Documents were produced by the prosecution and oral evidence was adduced in this case to prove the possession of the bucket M.O.2 with one litre of arrack in the same.

7. But, on an analysis of the evidence in this case, it is doubtful whether M.O.2 is the bucket which is seized from the possession of the accused. PW1 stated that he had affixed a label containing signature

of witnesses on M.O.2 bucket at the time when articles were seized from the possession of the appellant. But, it has come out in evidence that the bucket did not contain any such label while witnesses were examined in court. PW1 had no explanation for the missing of label on M.O.2. There is no evidence to establish in whose custody M.O.2 was before it was produced in court and even thereafter. No evidence is available to show whether the label affixed on M.O.2 was subsequently destroyed by wear and tear. PW1 deposed that the articles seized were entrusted with one Excise Guard Biju. As per Section 40 of the Act, the articles which are seized are to be produced before the Excise Inspector or the officer under Section 5A of the Act or the Station Officer of the nearby police station under sub clause (3) of Section 40 of the Act. But, the detecting officer himself has stated that the articles were entrusted with an Excise Guard by name Biju.

8. PW4, the Excise Inspector, was also examined. But, he has not specifically stated that the articles were received by him personally. His case is that the articles were produced at the office. He also has no case that the articles were produced by him or at his instruction, by some other person before the court. That apart, there is also violation of Section 40(3) of the Abkari Act, since PW4 has not produced the articles seized before the officer referred to in

sub clause (3) of Section 40 of the Act.

9. It is also to be noted that the definite case of the accused is that, the bucket which he was holding contained only water. As per the evidence already discussed, M.O.2 cannot be said to be the bucket which was seized from the scene, since the label which is allegedly affixed on the bucket at the scene is not seen on M.O.2. The appellant has a specific case that he had gone to attend the call of nature's with a bucket of water when he was arrested. As per evidence, no sample was taken from the article which was available in the bucket. PW1 admitted in cross-examination that the liquid available in the bucket was poured to the can and thereafter only the sample was taken from the can.

10. Therefore, it cannot be conclusively said that the liquid in the bucket was arrack itself. If the can contained arrack and the bucket contained only water, the prosecution cannot be said to have proved that the bucket contained arrack. It is pertinent to note that it was very easy to draw a sample from the bucket since it is opened and exposed whereas the can is having only a small outlet. When compared to the nature of the bucket and the can, it would be easier to take sample from the bucket than the can. But, PW1 has allegedly poured the liquid from the bucket to the can and thereafter a sample

was drawn from the can. Anyway, there is no evidence to show what exactly was the material available in the bucket held by the accused. Therefore, neither M.O.2 or the contents which are allegedly found in the bucket can be taken as an incriminating evidence against the appellant to prove possession of arrack by him.

11. Taking all these facts into consideration, I find that the prosecution has failed to establish that M.O.2 was the bucket held by the accused at the scene and that it contained liquor as alleged by the prosecution. Ext.P4, the chemical analysis report, will not prove the nature of the article which was found in the bucket, which was allegedly held by the appellant at the scene. The reasons shown for labelling the evidence of DW1 as false are too shabby and unacceptable.

In the result,

(1) The conviction and sentence passed against the appellant are set aside.

(2) The appellant is found not guilty and he is acquitted of the offence under Section 55(a) of the Abkari Act. He is set at liberty forthwith.

This appeal is allowed.

K. HEMA, JUDGE

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